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No. 500

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

FRUIT INDUSTRIES, INC.,
Petitioner,

vs.

STELLA PETTY, As Administratrix of the Estate of JULIUS E. PETTY, DECEASED; J. B. PETTY, SR., As Administrator of the Estate of JOE FORREST PETTY, DECEASED; and, ERNEST BAIRD and JOY JEFFREY, Individually and as partners, d b a BATESVILLE FUR COMPANY, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Fifth Circuit (App. A1)*, has been reported in 268 F.2d

*The Appendix to this petition is cited herein as "App." The printed record in the Court of Appeals is cited as "R". Pursuant to

391. There was no opinion by the District Court, but the verdict and final judgment on jury verdict in Case No. 3200*1, appears at (R. 33-34), and in Case No. 3201 at (R. 422-423), and in Case No. 3202 at (R. 462-463) respectively.

JURISDICTION.

The judgment of the Court of Appeals was entered on June 29, 1959, in the United States Court of Appeals for the Fifth Circuit (App. A1). An order denying rehearing was filed on September 11, 1959 (App. A21). On September 28, 1959, a stay of mandate for thirty days was filed provisioned upon the filing of a certificate of the Clerk of this Court of the filing of a petition for a writ of certiorari within the thirty-day period, and providing that

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Rule 21(4), nine copies of the printed record for the use of the court below are being filed with this petition. Such record constitutes the entire record of the proceedings and evidence in the District Court, and except for the omission of unimportant orders and stipulations was designated to constitute the record on appeal and was so printed. Certain exhibits were not printed in the designated record and were submitted to the Court of Appeals by stipulation. In the event of a grant of this petition, petitioners may wish to file such original exhibits in this Court.

*1. Three cases were brought against the petitioner, which are now the subject of this petition. In the United States District Court for the Southern District of Florida the cases were named and numbered as follows: Stella Petty, as Administratrix of the Estate of Julius E. Petty, Deceased, Plaintiff, vs. Fruit Industries, Inc., Defendant, Case No. 3200; J. B. Petty, Sr., as Administrator of the Estate of Joe Forrest Petty, Deceased, Plaintiff, vs. Fruit Industries, Inc., Defendant, Case No. 3201; and Ernest Baird and Joy Jeffrey, Individually and as partners, d/b/a Batesville Fur Company, Plaintiffs, vs. Fruit Industries, Inc., Defendant, Case No. 3202. The cases were by consent and order of Court consolidated for trial in the District Court (R. 25), and in the Court of Appeals (R. 2). Hereinafter for the convenience of the Court, the cases will be referred to by their District Court designated numbers.

if no such certificate is filed or upon the filing of an order of the Supreme Court denying the writ, if filed, the mandate should then issue. Said order was signed by J. C. Hutcheson, Jr., United States Circuit Judge (App. A27).

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The jurisdiction of the District Court in this cause was invoked under 28 U.S.C. 1332(a) and 1332(a)(1).

QUESTIONS PRESENTED.

In an action for damages in a diversity of citizenship case resulting from an automobile accident in Iowa between residents of Arkansas and Florida[1], the District Court refused to direct a verdict for the Petitioner, although as a matter of Iowa law under which the case should have been tried (since Iowa was the situs of the accident), the Respondents had failed to prove that the Petitioner's negligence, if any, was the proximate cause of their damage and had failed to plead and prove freedom from contributory negligence.

The District Court further refused to instruct the jury at the Petitioner's request that the Respondent driver was guilty of contributory negligence as a matter of Iowa law and failed to instruct the jury that under the Iowa law the burden of proof was upon the Respondent in all three cases to plead and prove their own freedom from contributory negligence. The District Court did instruct the jury, contrary to the Iowa law, that the contributory negligence of the driver of the Respondent's car could not be imputed to the other two Respondents and, there-

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1. In all three cases there was diversity of citizenship and an amount involved sufficient to give the District Court jurisdiction under 28 U.S.C. 1332 (a) and 1332 (a)(1).

fore, the question of contributory negligence was only in issue in the case of the driver.

The questions presented are:

1. Whether the trial court erred in not applying the law of Iowa and in refusing to direct a verdict for the petitioner and further erred in refusing to grant judgment notwithstanding the verdict or in the alternative to order a new trial because of the respondent's failure to establish the proof necessary under the Iowa law, which was the situs of the case and was, therefore, the controlling law because:

(a) Under the Iowa law the respondents as a matter of law failed to prove by a preponderance of the evidence that the evidence, if any, of the negligence of the petitioner was the proximate cause of their damage.

(b) Because under the Iowa law the respondent's decedent in Case No. 3200 was guilty of contributory negligence as a matter of Iowa law which would preclude his recovery, and;

(c) Because the respondents in Cases Nos. 3201 and 3202 offered no evidence of any kind as to their own freedom from contributory negligence and, therefore, failed to make a *prima facie* case.

2. Whether the District Court failed to properly instruct the jury as to the Iowa law to be applied.

3. Whether the United States Court of Appeals for the Fifth Circuit in not reviewing the failure of the trial court to apply the Iowa law so far sanctioned a departure of the lower court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, because it was apparent on the face of the record that a miscarriage of justice would occur.

4. Whether the decision of the United States Court of Appeals for the Fifth Circuit affirming the action of the District Court in failing to properly apply the Iowa law is not in conflict with the decision of the United States Court of Appeals for the Eighth Circuit on the same matter.

STATUTES INVOLVED.

The pertinent statutory provisions are set forth in the Appendix, *infra*, p. A29.

STATEMENT.

These cases arose as the result of an automobile accident occurring in the State of Iowa on December 21, 1956, wherein an automobile driven by Julius E. Petty of Stuttgart, Arkansas, collided with a truck owned and being operated by the Standard Oil Co. (R. 47, 76). The latter was not made a party to any of these suits. Riding in the automobile as a passenger was Joe Forrest Petty. Furs being transported in the Petty automobile, which were damaged by fire in the accident, were owned by the plaintiff in Case No. 3202. Plaintiffs in Case No. 3200 and 3201, were the administratrix and administrator of the estates of the deceased occupants of the Petty car.

The defendant below is a Florida Corporation and the owner of a truck which was proceeding in the same direction and behind the Standard Oil truck, just prior to the accident in question, which occurred about 9:30 A.M., on Highway 218, nine miles north of Donnellson,

Iowa (R. 73, 74, 75). The weather was foggy and the highway wet and slippery (R. 78, 81). The accident occurred when the Petty automobile traveling north skidded or was driven into the west lane of the highway and there collided with the Standard Oil truck which was proceeding southerly in the west lane.

The complaint in each case alleged that the negligent operation of the petitioner's truck in pulling out to pass the Standard Oil truck was the proximate cause of the accident in that respondent's driver was thereby caused to believe that he was in impending peril of collision and to avoid such collision applied his brakes, causing the vehicle to swerve into the west lane (R. 3-9, 402-408, 435-441).

In none of the three cases did the respondents allege freedom from contributory negligence as is required in Iowa. Petitioner affirmatively alleged contributory negligence of the driver Petty as a matter of law. Respondent in Case No. 3200, to overcome the charge of contributory negligence on the part of the driver of the Petty automobile, introduced only the testimony of the Standard Oil driver (R. 73). The respondents in Cases Nos. 3201 and 3202 introduced no evidence of their freedom from contributory negligence as required by the Iowa law.

Trial of the cases in the District Court resulted in verdicts for the respondents*. On appeal to the United States Court of Appeals for the Fifth Circuit petitioner assigned as error of the District Court the failure of that

*The verdict in Case No. 3200 was $38,901.61, for the death of Julius E. Petty. The verdict in Case No. 3201 was $22,572.08, for the death of Joe Forrest Petty. The verdict in Case No. 3202 was $13,385.80, for damages to the pelts carried in the Petty automobile. At the time of their deaths, Julius E. Petty was 45 years old and Joe Forrest Petty was 13 years old.

court to direct a verdict in its favor at the end of the evidence; the failure of the trial court to find as a matter of law that the respondent's decedent in Case No. 3200 was guilty of contributory negligence as a matter of law; that the trial court erred in denying petitioner's motion to set aside the verdicts, or in the alternative to order a new trial; that the trial court erred in failing to find that the verdicts were excessive.

There was little dispute between the petitioner and the respondents concerning the circumstances that resulted in the accident. Respondents in each case relied heavily upon the testimony of the Standard Oil truck driver (R. 73). There was no direct evidence as to the causation of the conduct of the driver of the Petty car. The evidence most favorable to the respondents, if taken as true, could result only in the following:

Respondent's automobile was traveling north at least sixty miles an hour (R. 83). Petitioner's truck was traveling south behind the Standard Oil truck (R. 75). Visibility was about 500 feet because of heavy fog (R. 78). The highway was blacktop and slippery (R. 81). The Standard Oil driver first saw the Petty automobile approximately 500 feet ahead of him coming towards him (R. 89). The Standard Oil truck had traveled 75 to 100 feet between the time the driver first saw the Petty automobile ahead of him and the time he first saw the Petty automobile begin to skid (R. 92). At this point the Petty automobile was 200 to 300 feet closer to the Standard Oil truck (R. 78). After the Petty automobile started to skid it moved into the west lane, then back into the east lane, then back again into the west lane where it collided head-on with the Standard Oil truck (R. 76). The collision occurred entirely in the west lane (R. 98).

Prior to the accident the petitioner's driver had pulled out into the east lane as if to pass the Standard Oil truck, but prior to the time the Petty automobile started to skid petitioner's driver had started to drop back in behind the Standard Oil truck in his own lane and was only two or three feet in the east lane at the time the Petty automobile began to skid (R. 77-90. When the petitioner's truck pulled out to pass the Standard Oil truck it was 50 to 75 feet behind the Standard Oil truck (R. 77).

Respondents' theory of the case is readily apparent. They reasoned that when the Petty driver saw the petitioner's truck appear to begin to pass the Standard Oil truck which might cause a head-on collision with the petitioner's truck, the driver of the Petty car applied his brakes causing him to skid in front of the truck immediately preceding the petitioner's truck, which was the Standard Oil truck (R. 3-9, 402-408, 435-441). Respondents assigned as the actionable negligence of the petitioner the act of the petitioner's driver in pulling out to pass the Standard Oil truck. The respondents further theorize that although the Petty driver was in the wrong lane of traffic at the time of the actual collision which would be *prima facie* evidence of the negligence of the Petty driver, nevertheless, such negligence is excused legally by virtue of an emergency created by the petitioner. Such emergency the respondents assign to the petitioner on the basis of the facts elicited by the testimony of the Standard Oil truck driver (R. 73).

It becomes, therefore, apparent that, respondents' entire case with respect to the proximate cause of the accident resting on the petitioner is bottomed on circumstantial evidence as is the freedom from contributory negligence, which it was the burden of the respondent in Case No. 3200 to establish in order to recover. No evidence was presented

in Cases Nos. 3201 or 3202 concerning the freedom from contributory negligence of the respondents in those cases.

Petitioner's theory of the case is, that based upon the evidence most favorable to the respondents, they failed to establish a *prima facie* case against the petitioner in Case No. 3200 because the burden of proof rested upon the respondent in that case to establish freedom from contributory negligence and the presumptions attempted to be drawn by the respondent in that case as to his freedom from contributory negligence being bottomed entirely upon circumstantial evidence, did not sufficiently rebut the *prima facie* negligence of the respondent's driver in being on the wrong side of the road when the accident occurred. Moreover, since under Iowa law any negligence on the part of the respondent in that case would preclude recovery, that negligence was present as a matter of law because of the position of the automobile of the respondent at the time the accident occurred.

Petitioner further asserts that the respondents in all three cases failed to establish their *prima facie* case against the petitioner, since taking the evidence most favorable to the respondents as true, they failed to establish as a matter of law that the negligence, if any, of the petitioner was the proximate, moving cause of their damage.

During the trial an effort was made by the court and counsel to define the Iowa law as it would be controlling in the case. Counsel for the petitioner urged the proper Iowa rule in connection with contributory negligence, which is that the plaintiff has the burden of proving he is free from contributory negligence in tort actions (R. 330 and 364), and at least on one occasion the court stated the proper rule (R. 364). Notwithstanding that fact, the court ruled that contributory negligence could not be urged

against the plaintiffs in Cases Nos. 3201 and 3202 (R. 364-5) and so instructed the jury. The court further instructed the jury that the duty of the parties was governed by the law of Iowa (R. 376), but failed to give the proper rule to be applied by the jury and instructed the jury that contributory negligence was not an issue in Cases Nos. 3201 and 3202 (R. 382, 384-5, 387), contrary to Iowa law.

The respondents were required to establish that the negligence of the petitioner was the proximate cause of the accident as a matter of law under the Iowa rules, and that burden was not successfully carried by the respondent. At the time the instructions were given no further objection was made by petitioner's counsel to the instructions other than during the colloquy between the court and counsel as to the instruction that should be given.

REASONS FOR GRANTING THE WRIT.

1. Failure of Federal (Florida) Court to Apply the Law of the Situs (Iowa).

Petitioner herein submits that this case, both in the trial court and in the Court of Appeals, has so far failed to recognize the Iowa law under which the case should have been tried that substantial injustice will be done if the case is not reversed and remanded, and the only avenue presently open to the petitioner is through this Court. This case arose as a result of an accident in Iowa and the Iowa law should have been applied correctly by the courts below.

At the end of the respondents' evidence a proper motion to direct a verdict against the respondents was made by the petitioner's counsel. At such point in the proceeding re-

spondents had failed as a matter of law to establish by a preponderance of the evidence that the negligence, if any, of the petitioner was the proximate cause of respondents' damages. Moreover, respondents had wholly failed to plead or prove freedom from contributory negligence in Cases Nos. 3201 and 3202, or prove freedom from contributory negligence (in Case No. 3200). These were requirements of the Iowa law binding upon the Florida courts in this case. The failure of those courts to require the respondents to comply with the Iowa law resulted in an injustice to the petitioner; since had the Iowa rule been applied petitioner would have obviously been entitled to a directed verdict in all three cases.

Again at the end of all the evidence another motion for a directed verdict was made and overruled by the trial court. At that point in the proceedings there had been an ultimate failure on the part of the respondents to assume their burden under the Iowa law. Thereafter, in a colloquy between counsel and the court concerning instructions the court failed to follow the requests of the petitioner in giving the correct rule as to the Iowa law and proceeded to instruct the jury contrary to that law.

It is on this basis that we submit that the jurisdiction of this Court should be invoked in order to rectify an obvious miscarriage of justice to the parties and an obvious misinterpretation of the Iowa law by the United States Courts in the Fifth Circuit. The failure of those courts to comprehend the Iowa law and apply it as the case now stands will be contrary to the decisions in the United States Court of Appeals for the Eighth Circuit with respect to the true Iowa rule as it is applied to this case. *Chicago, R. I. & P. R. Co. v. Lorejoy*, 8th Circuit (1953), 206 F.2d 77.

Scott v. *C., R. I. & P. R. R. Co.*, 8th Circuit, 197 F.2d 259 (1952). In this case the court held:

> "Under Iowa law plaintiff in a tort action has the burden of proving his freedom from contributory negligence. Citing Kinney v. Larsen, 239 Iowa 494, 31 N.W.2d 635; Mast v. Illinois Central, 8th Circuit, 176 F.2d 157."

In the *Mast* case, 8th Circuit, 176 F.2d 157, the court said:

> "For conceding that negligence as a cause of the collision, the burden was still upon the appellant to prove Mast's freedom from contributory negligence and on this question the appellant offered no material evidence."

The court said in *Russell* v. *Turner*, 148 F.2d 562, 8th Circuit (1945):

> "The considered opinion of a trial judge as to a question of local law may properly be accorded great weight by this court. It will not adopt a view contrary to that of the trial judge unless convinced of error (citing cases). This does not mean that an appellant in order to obtain a reversal of a judgment in a case such as this must demonstrate error to a mathematical certainty, but it does mean that this court will not overrule a decision of a trial judge upon a question of state law except for cogent and convincing reasons."

The court further said in the *Mast* case, *supra*.

> "All that this court reasonably can be expected to do in reviewing cases governed by state law is to see that the determination of the trial court is not induced by clear misconception or misapplication of the law."

The requirement that a plaintiff must prove freedom from contributory negligence is well settled in a long line of Iowa decisions, including the most recent case of *Plum*

v. *M. & St. L.*, 91 N.W.2d 380, 249 Iowa 1187 (1958), where a passenger was required to plead and prove freedom from contributory negligence and an instruction that if the driver was free from contributory negligence it may be assumed that the passenger was also free therefrom, was held to be error, and in the case of *Paulson* v. *Haker*, Iowa , 95 N.W.2d 47 (1959), where it is said:

> "The negligence of the driver of the McCalmant car, if such there was, would not be imputed to the plaintiff's decedent here, but she was required to exercise ordinary care for her own safety. The burden being upon plaintiff to establish her freedom from negligence contributing to the injuries suffered in the absence of any evidence whatever upon the question of what she did or did not do, must be held as a matter of Iowa law, their case has failed in this respect (Citing 65 C.J.S., Negligence, Pars. 150, 151 and 157, Pages 794, 795)."

It has further been held in Iowa that it is not necessary that contributory negligence be shown before a directed verdict will be given, but only that there is insufficient evidence to show freedom from contributory negligence. *Scherer* v. *Scandrett*, 235 Iowa 229, 16 N.W.2d 329 (1944).

With respect to the question of all three of the respondents' cases it was incumbent upon the respondents to prove by the greater weight or preponderance of the evidence that the negligence complained of was the proximate cause of the injury sustained. *Van Wie* v. *United States*, 77 F. Supp. 22 (D.C., S.D., Ia., 1948). In that case it was further held that under the Iowa law in negligence cases:

> "by proximate cause is meant the direct and natural cause, unbroken by any other cause, without which the mishap would not have happened."

Further that case holds in Iowa contributory negligence means such negligence as contributes in any way or any degree directly to the injuries complained of.

Furthermore, in Iowa the plaintiff must *plead* and *prove* freedom from contributory negligence, even though Rule 8C of the Federal Rules of Civil Procedure asserts contributory negligence to be an affirmative defense. *Erie* v. *Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 114 A.L.R. 1487; *Cities Service* v. *Dunlap*, 308 U.S. 208, 60 S. Ct. 201. And in Iowa it has been held that the failure to allege freedom from contributory negligence is grounds for dismissal for failure to state a cause of action. *Brown* v. *Ill. Cent. R. Co.*, 123 Iowa 239, 98 N.W. 625; *Cahill* v. *Ill. Central Railway*, 137 Iowa 577, 115 N.W. 216.

But it was held in *Wilson* v. *Corbin*, 41 N.W.2d 702 (1950), 214 Iowa 593, that even though the plaintiff fails to plead freedom from contributory negligence and the defendant does so plead it as a defense, the burden of proof remains upon the plaintiff.

The burden, therefore, rested upon the respondent in Case No. 3200 to prove by a preponderance of the evidence the freedom from contributory negligence of the driver, Petty. The facts disclose that the driver, Petty, at the time of the accident, was on the wrong side of the road. Under the doctrine of *Babendure* v. *Baker*, 218 Iowa 31, 253 N.W. 834 and *Lanman* v. *Dearmin*, 246 Iowa 697, 69 N.W.2d 49, where a plaintiff is on the wrong side of the road it is *prima facie* negligence. As such it becomes the duty of the plaintiff, in order to assume its burden of showing freedom from contributory negligence, to do so by showing a legal excuse for being on the wrong side of the road at the time of the accident. The only evidence in this case that there was a legal excuse for the driver,

Petty, being on the wrong side of the road at the time of the accident comes purely from inferences made chiefly in argument by respondent's counsel. The legal excuse is reasoned by inference to be that the petitioner's alleged negligence in attempting to pass the Standard Oil truck when 500 feet from the plaintiff travelling in the opposite direction was such as to create a sudden emergency for the plaintiff, excusing his appearance on the wrong side of the road. But this is based entirely upon fact inferences not supported by the evidence. In the language of *Nitka* v. *Van Camp*, 40 N.W.2d 570, 256 Wis. 119:

> "There is no testimony in the record from which any inference can be drawn that would result in a reasonable conclusion as to what caused the accident."

Here we are faced with two inferences. (1) The inference of *prima facie* negligence, which is an inference of law, and (2) the inference of fact drawn by the respondent in Case No. 3200. But inferences of fact should never infer certain desired conclusions for they do not rise to the dignity of inferences or presumptions of law. As said by Judge Graven in *Mast* v. *Ill. Cent.*, 79 F. Supp. 149 (N.D.Ia. 1948), affirmed 176 F.2d 157, 8th Circuit (1949):

> "Either inference must first be grounded on facts that will support the inference which is best regarded as a logical conclusion."

and further,

> "It is a general rule that presumptions do not create their own foundations."

Citing *Monaghan* v. *Equitable Life Insurance Co.*, (1918), 184 Iowa 352, 162 N.W. 892. There further quoting:

> "But that certain evidence will raise a presumption of negligence does not in the least tend to estab-

lish that there is such evidence and presumptions warranted by the evidence of certain facts is no evidence of such facts."

Obviously therefore, either the inference in law in this case was not rebutted by the inference in fact to an extent that it can be said as a matter of law that the respondent assumed its burden to establish proximate cause and freedom from contributory negligence or at the most the two inferences created an equipoise. In either event the burden was not carried under the Iowa law and the motion for directed verdict in Case No. 3200 should have been sustained.

It can be seen from the above that there was failure on the part of the respondents in these cases to assume their burden, which would not only have justified but required the court to direct a verdict in favor of the petitioner. The failure of the trial court to so rule, and the Court of Appeals to reverse has effectively produced a situation where not only does an injustice exist as against the petitioner, but also it produces an incorrect conception of the law in the judicial archives of the United States Courts in Florida and the Fifth Circuit. It is for this reason that the petitioner so strongly urges this Court to issue a writ of certiorari to the Fifth Circuit Court of Appeals to correct this error, as is within the jurisdiction of this Court under Rule 19 of the Rules of the Supreme Court of the United States.

2. Failure of Federal (Florida) Court to Instruct the Jury As to the Law of the Situs (Iowa).

So far we have assumed that the error of the courts below rested in the failure to understand and apply the Iowa law with respect to a direction against the respondents. This question is always preserved for review and it

has been said in *Coca Cola Bottling Company* v. *Hubbard*, (C.A. 8th, 1953) 203 F.2d 859:

> "But in determining whether a trial court has erred in denying a motion for a directed verdict made at the close of the evidence, it is the applicable law which is controlling, and not what the trial court announces the law to be in his instructions. This Court (appellate court) must ascertain for itself what the applicable law is, whether the instructions were excepted to or not. A proper motion for a directed verdict and its denial will always preserve for review the question whether under the law truly applicable to the case there was an adequate evidentiary basis for the submission of the case to the jury."

To be sure the petitioner assigned as error of the trial court the failure to so direct regardless of the question as to whether or not counsel for petitioner properly objected to instructions given or refused by the trial court as not properly advising the jury of the Iowa law. While it is generally true under Rule 51 of the Federal Rules of Civil Procedure that where objections are not made to such instructions or where objections are not made to the failure of the court to give requested instructions, such question may not later be raised on appellate review, it has also been held that the appellate court may in its discretion consider grounds of error in spite of a failure to object below where it is apparent on the face of the record that a miscarriage of justice may occur. *Shimabukuro* v. *Nagayama*, (App. D.C. 1944) 140 F.2d 13. In the Shimabukuro case the appellate court for the District of Columbia said, in discussing the impact of Rule 51 of the Federal Rules of Civil Procedure:

> "The power of an appellate court on its own motion to consider grounds of error not raised below is not one which should be exercised in an ordinary case.

> "But where it is apparent to the appellate court on the face of the record that a miscarriage of justice may occur because counsel has not properly protected his client by timely objection, error which has been waived below may be considered on review. * * * There is no logical reason for refusing to exercise our power to notice fundamental error in cases where personal or property rights are involved. * * *"

And the Fifth Circuit in *Doucell, Inc.*, v. *Jowers*, 166 F.2d 214 (1948), has held:

> "We are of the opinion that the error committed is of such gravity that the case must be reversed on this ground also unless the failure of the defendant's attorney to object to the charge forecloses consideration of the point by us. * * * The court's right in a proper case to consider on its own motion errors patent upon the face of the record where no objection was made, was considered by the United States Court of Appeals for the District of Columbia in Shimabukuro v. Nagayama, supra. We find ourselves in thorough accord with the decision in that case."

And in *Hormel* v. *Helvering*, (1941) 312 U.S. 552, 61 S. Ct. 719, 85 L. Ed. 1037, Mr. Justice Black, speaking for this court, said:

> "There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below."

The petitioner here respectfully suggests that the trial court was in error in failing to give proper instructions as to the Iowa law and that such failure on the part of the trial court should have been corrected by the trial court, regardless of objections of counsel, since it is incumbent

upon the court to instruct the jury concerning the correct law. The failure of the trial court in this respect, we respectfully submit, should have been sufficient under all the circumstances to have required the Court of Appeals to return the case to the court below. Yet the opinion of the Court of Appeals in this case makes no mention of the errors of the lower court that were patent upon the face of the record, even though such matters were called to the court's attention in oral argument and cases were submitted in support. Accordingly, great injustice will be done unless this honorable court sees fit to issue a writ of certiorari to the Fifth Circuit Court of Appeals for the purpose of reviewing the failure of that court to reverse the order of the lower court in denying petitioner's motion for a directed verdict in the first place, denying petitioner's motion for a judgment notwithstanding the verdict in the second place, denying petitioner's motion for a new trial in the third place, and in failure to properly instruct the jury as to the Iowa law, which failure resulted in influencing the jury to bring in an award for the respondents on the basis of a misapprehension of the law that the jury should apply to the facts found.

CONCLUSION

The courts have a basic duty to protect the rights of parties before them and to assure that the fundamental rights to a trial before the courts in accordance with the proper law shall not be abridged. In this case the petitioner's rights have been abridged and it has not had an opportunity to have this dispute determined in accordance with the applicable law. It is important to the administration of justice in the Federal courts that the decision below be reviewed and reversed by this Court so that it

will not stand as a precedent or reference to an improper statement of the applicable Iowa law. To insure consistency in the United States Courts of Appeal as to the proper law to be applied in cases before them it is important that this court review the errors of the courts below in this case so that the decisions of the United States Court of Appeals for the Fifth Circuit can be in conformity with what the Iowa law is perceived and held to be, not only in Iowa and the Court of Appeals for the Eighth Circuit, but in the other Federal circuits generally.*

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*See Rule 19 of the Revised Rules of the Supreme Court of the United States (App. A31).